In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 403

WILLIAM ANDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Northern District of Illinois of the sale of heroin on January 11, 1965, and was sentenced as a second offender to imprisonment for fifteen years. The court of appeals affirmed.

At trial, petitioner was acquitted on two counts based on a sale of heroin alleged to have occurred on December 17, 1964. On appeal, he argued for the first time (as he now urges in the petition for a

writ of certiorari) that both his conviction and acquittal should be set aside and a new trial granted on the ground that the verdict was inconsistent.

As to the alleged sale on December 17, 1964, on which petitioner was acquitted, the evidence showed that on that date Agent Tucker went with an informant to the Grand Prix Lounge in Chicago and arranged to purchase narcotics from petitioner. Tucker paid petitioner $135 in advance funds (R. 6, 11-12). At about 7:45 p.m., petitioner telephoned the informant to designate the meeting place as a parking lot at 3651 South Federal. The informant drove there, with Tucker lying on the floor in the back of the informant's car. Petitioner walked over from his car and handed the informant an aluminum foil package. Petitioner was heard to say, "Tell your man he can cut it two and a half times." (R. 7, 12). After petitioner left, the informant gave Tucker the package, which was tested and found to contain narcotics (R. 8, 12).

With respect to the sale on January 11 (of which petitioner was convicted) the evidence showed that Agent Tucker and the informant again arranged a purchase at the Grand Prix Lounge. In accordance with petitioner's instructions, Tucker gave the informant $425 which the informant handed to petitioner in his car (R. 9, 13). The parties then drove to the parking lot at 3651 South Federal. Petitioner walked to the passenger side of the car Tucker was driving and handed a cigarette package to the informant, who handed it to Tucker (R. 9-10,

13). The package was later tested and found to contain narcotics (R. 10, 14-15).

Petitioner argues that, since the same agent testified to both sales and petitioner denied making both sales, the jury should logically have convicted or acquitted on all counts. He asks this Court to overrule the principle (enunciated in *Dunn* v. *United States*, 284 U.S. 390, and reaffirmed in *United States* v. *Dotterweich*, 320 U.S. 277) that consistency in a verdict is not required. There is no reason, we submit, for the Court to reconsider that settled principle in this case. The function of a jury in criminal cases is the same today as when those decisions were rendered.

Moreover, there is no necessary inconsistency in the conviction based on the sale in January and the acquittal as to the separate sale alleged to have occurred three weeks before. As set forth above, the evidence as to the January sale was more direct than that as to the December sale; in January, Tucker was in the driver's seat of the car when petitioner handed the heroin to the informant; in December, Tucker was lying on the floor of the car and did not receive the package until after petitioner had walked away. Even if it were to be presumed that absolute inconsistency in a verdict would not be accepted, there would be no sound reason to adopt a rule which would require an appellate court to do what petitioner seeks —*i.e.*, examine the underlying evidence to decide whether it can reconcile the jury's determination as to separate charges on the basis of the detailed evidence as to each crime.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

August 1966.

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